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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

THE CITY OF NEW YORK and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF CITY OF NEW YORK,

Plaintiffs,

VS.

PACIFIC EMPLOYERS INSURANCE CO.,

Defendant.

APR 0 6 2010 APR OFFICE
Civil Action No.

IN CLEA

OFFICE

10 1518 ROSS J

TO THE JUDGES FOR THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK:

GO, M.J.

PLEASE TAKE NOTICE that Defendant Pacific Employers Insurance Company ("Defendant" or "Pacific") hereby files this Notice of Removal of the above-captioned matter from the Supreme Court of the State of New York, County of Kings, Index No. 4955/10, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, and in support, states:

- 1. This action was commenced against Pacific in the Supreme Court of the State of New York, County of Kings, Index No. 4955/10 on or about February 26, 2010 (the "State Court action"). A true and correct copy of the Summons and Complaint are attached hereto as Exhibit A.
- 2. The Summons and Complaint were received by the Defendant on March 8, 2010. Therefore, removal of this action is timely pursuant to 28 U.S.C. § 1446(b) as this Notice was filed within thirty (30) days after service of the Complaint on Pacific.
- 3. Upon information and belief, Plaintiff The City of New York (the "City") is a municipal corporation organized and existing under the laws of the State of New York and Plaintiff The Board of Education of the City School District of City of New York (the "DOE") is a corporate body created under the laws of the State of New York, with its principal place of

business located in the City and State of New York (the City and the DOE are collectively referred to herein as "Plaintiffs"). Defendant Pacific Employers Insurance Company is a foreign corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business located at 436 Walnut Street, Philadelphia, Pennsylvania 19106.

- 4. Plaintiffs are seeking a judgment declaring that Pacific is obligated to defend the City and the DOE in an action entitled Thomas Marten and Christine Marten v. City of New York and the New York City Department of Education, currently pending in the Supreme Court of the State of New York, County of Kings, Index No. 622/05 (the "Marten action"), and for recovery of fees and expenses related to the City's defense of itself and the DOE in the Marten action.
- 5. In light of the allegations in the <u>Marten</u> Complaint, the type of damages sought by Plaintiffs, and the types of injuries described by Plaintiffs, a reasonable reading of the <u>Marten</u> Complaint reveals that the amount in controversy in the instant matter is in excess of \$75,000, exclusive of interest and costs.
- 6. Based on the aforesaid, this Court has jurisdiction over this action based upon diversity of citizenship under 28 U.S.C. § 1332.
- 7. This Notice of Removal is being filed in the Eastern District of New York, the district court of the United States for the district within which the State Court action is pending, as required by 28 U.S.C. §§ 1446(a) and 1441(a).
- 8. Pursuant to 28 U.S.C. § 1446(d), written notice of the filing of this Notice of Removal will be given to Plaintiffs, and a copy of the Notice of Removal will be filed with the Clerk of the Supreme Court of the State of New York, County of Kings, in the form attached hereto as Exhibit B.

9. This Notice of Removal is signed pursuant to Rule 11 of the Federal Rules of Civil Procedure, as required by 28 U.S.C. § 1446(a).

WHEREFORE, Defendant respectfully requests that this action be duly removed to this Court, and that it proceed herein.

Dated: New York, New York April 6, 2010

GIBBONS P.C.

One Pennsylvania Plaza, 37th Floor New York, New York 10119-3701 Telephone (212) 613-2000 Facsimile (212) 290-2018 msidoti@gibbonslaw.com psaso@gibbonslaw.com Attorneys for Defendant Pacific Employers Insurance Company

Mark S. Sidoti Paul A. Saso 4955/2010 Summ. & compl. (Page 1 of 11)

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COUNTY OF KINGS	
THE CITY OF NEW YORK and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF CITY OF NEW YORK,	SUMMONS
Plaintiffs,	Index No. 4955 /10
-against-	Filed: February 26, 2010
PACIFIC EMPLOYERS INSURANCE CO.,	•
Defendant.	
X	

TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to serve upon plaintiffs' attorney an answer to the complaint in this action within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiffs designate Kings County as the place of trial in accordance with CPLR § 503(a).

Dated:

New York, New York February 26, 2010

MICHAEL A. CARDOZO

Corporation Counsel of the City of New York Attorney for Plaintiffs 100 Church Street, 20th Floor New York, NY 10007 (212) 442-0588

By:

Sabita Krishnan

Assistant Corporation Counsel

Jalita Kushnan

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SUPREME COURT OF THE STATE OF COUNTY OF KINGS	F NEW YORK	
THE CITY OF NEW YORK and THE B EDUCATION OF THE CITY SCHOOL CITY OF NEW YORK,	OARD OF	VERIFIED COMPLAINT Index No/10
-against-	Filed: February 26, 2010	
PACIFIC EMPLOYERS INSURANCE	CO.,	
	Defendant.	
~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~	X	

Plaintiffs, the City of New York (the "City") and the Board of Education of the City School District of the City of New York, by their attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, allege upon personal knowledge as to themselves and upon information and belief as to all other matters:

### INTRODUCTION

1. This is an action for a declaration that defendant Pacific Employers Insurance Company ("Pacific") has a duty to defend the City and the DOE in action entitled Thomas Marten and Christine Marten v. City of New York and the New York City Department of Education, Index No. 622/05, Supreme Court, Kings County (the "Marten Action") and for recovery of the City defense costs in the Marten Action.

## **PARTIES**

2. The City is a municipal corporation organized pursuant to the laws of the State of New York.

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4. Defendant Pacific is an insurance company transacting insurance business in New York with its principal place of business at 436 Walnut St., Philadelphia, Pa 19106.

#### JURISDICTION AND VENUE

- This Court has jurisdiction over defendants pursuant to CPLR §§ 301 and
   302.
  - 6. Venue in Kings County is proper pursuant to CPLR § 503(a).

#### **FACTS**

- 7. On or about August 1, 2003, Johnson Controls Inc. ("Johnson") entered into a contract with the DOE for maintenance services at several New York City public schools, including the school formerly known as I.S. 49 ("I.S. 49"), located at 223 Graham Avenue, Brooklyn, New York (the "Contract").
- 8. Pursuant to the Contract, Johnson obligated itself to obtain a comprehensive general liability insurance policy in which the City and the DOE were named as additional insureds for claims arising out of Johnson's operations under the Contract.
- 9. Pursuant to its obligation under the Contract, Johnson purchased from Pacific a general liability policy (policy number HDOG2173195A) with an effective date of October 1, 2003 and an expiration date of October 1, 2004 (the "Policy").
  - 10. Johnson is a named insured under the Policy.
  - 11. The City and the DOE are additional insureds under the Policy.
- 12. On or about November 18, 2003, Thomas Marten ("Marten") was allegedly injured at the entranceway to I.S. 49.

- 13. On or about January 3, 2005, the City was served with a summons and verified complaint in the *Marten* Action (the "*Marten* Complaint"). The *Marten* Complaint alleges that Marten was injured at the entranceway to I.S. 49 as a result of the defendants' negligent maintenance of the premises.
- 14. Accordingly, the allegations of the *Martin* Complaint are within the coverage of the Pacific Policy.
- 15. The Marten Action did not name Johnson as a defendant. On or about December 11, 2009, the City and the DOE served Johnson with a summons and third-party complaint.

#### Pacific's Liability

- 16. Based on instructions of Johnson's counsel, the City and Johnson have a long standing practice that the City sends to Johnson's counsel notice of any claim filed against the City or the DOE that arises out of Johnson's operations under a contract with the City or the DOE. Johnson is Pacific's agent with respect to accepting and responding to notices of claims under the Policy.
- 17. By facsimile dated July 6, 2007, the New York City Law Department (the "Law Department") notified Johnson's counsel of the City's receipt of the Marten Complaint and requested a defense for the City and the DOE in the Marten Action.
- 18. Upon information and belief Johnson's counsel forwarded the *Marten* Complaint to Pacific.
- 19. The Law Department again demanded a defense by facsimiles dated October 5, 2007 and November 30, 2007 sent to Johnson's counsel. The Law Department also included a New York City Police Department Line-of-Duty Injury Report, stating that Marten

was injured after he slipped on wet stairs at I.S. 49 on November 18, 2003, with the latter facsimile.

- 20. Having failed to receive any written response from Pacific in over two years, on October 26, 2009 the Law Department again contacted Johnson's counsel by email and requested a written response.
- 21. By email dated October 27, 2009, Johnson's counsel responded, rejecting the tender because the claims did not fall within the scope of Johnson's responsibility and/or the tender was untimely. Johnson made this disclaimer as Pacific's agent.
  - 22. The disclaimer is invalid under the law of New York.
- 23. As of the date of this complaint, Pacific has failed to assume the defense of the Marten Action.
- 24. As a result of Pacific's failure to provide the City and the DOE with a defense in the *Marten* Action, the City and the DOE have defended themselves through the Law Department.

# AS AND FOR A FIRST CAUSE OF ACTION (Declaration of Duty to Defend)

- 25. The City and the DOE repeat and reallege paragraphs 1 through 24 as if fully set forth herein.
- 26. Despite the City and the DOE's demand that Pacific defend them in the Marten Action under the Policy, Pacific has failed and refused to do so, in breach of its obligations under that policy.
- 27. Pacific's failure to accept the City and DOE's tender of defense in the Marten Action violates the Policy and the law.

28. There is therefore an actual controversy of a justiciable nature between the City and the DOE and Pacific as to whether Pacific is obligated to defend the City and the DOE in the *Marten* Action under the terms of the Policy. A judicial declaration that Pacific is obligated to defend the City and the DOE is necessary and appropriate at this time because, as a result of Pacific's failure to accept the City and DOE's tender of defense, the City has been forced to incur costs and expenses in providing its own defense and a defense of the DOE and may be forced, at any time, to pay any settlement or judgment.

# AS AND FOR A SECOND CAUSE OF ACTION (Recovery of Costs of Defense)

- 29. The City and the DOE repeat and reallege paragraphs 1 through 28 as if fully set forth herein.
- 30. Beginning no later than the City and DOE's July 6, 2007 demand, Pacific has been obligated to defend the City and the DOE in the *Marten* Action.
- 31. Despite the City and DOE's demand that Pacific provide the City with a defense in the *Marten* Action, Pacific has failed and refused to do so.
- 32. When an insurance carrier has wrongfully refused to acknowledge its defense obligation, the Law Department charges the carrier \$250 per hour for attorney time and \$75 per hour for paralegal time.
- 33. Pacific is accordingly liable for the City's defense costs in the *Marten* Action, beginning no later than July 6, 2007, through the time that Pacific undertakes such defense in the *Marten* Action, at the rate of \$250 per hour for attorney time and \$75 per hour for paralegal time, plus out-of-pocket costs and interest.
  - 34. WHEREFORE, the City and the DOE demand judgment:

(a) On the First Cause of Action, declaring that Pacific is obligated under the Policy to defend the City and the DOE in the Marten Action;

- (b) On the Second Cause of Action, against Pacific for fees and expenses relating to the City's defense of itself and the DOE in the *Marten* Action, at the rate of \$250 per hour for attorney time and \$75 per hour for paralegal time plus out-of-pocket expenses and interest, from July 6, 2007 through the time when Pacific comes to provide such defense of the *Marten* Action, in an amount to be proven at trial; and
- (c) For such other relief as this Court may deem just and proper.

Dated: New York, New York February 26, 2010

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Plaintiffs the City of New York
and the Board of Education of the City
School District of the City of New York
100 Church Street, Rm. 20-91
New York, New York 10007
(212) 442-0588

By: <u>Abita Kuchuan</u> SABITA KRISHNAN

Assistant Corporation Counsel



# THE CITY OF NEW YORK LAW DEPARTMENT

100 CHURCH STREET NEW YORK, NY 10007 Sabita Krishaan Phone: (212) 442-0588 Fax: (212) 788-1633 skrishna@law.nyc.gov

Dear Sir or Madam,

MICHAEL A. CARDOZO

Corporation Counsel Counsel

The City of New York and the Board of Education of the City School District of the City of New York (the "Board") are the plaintiffs in the case, City of New York and the Board of Education of the City School District of the City of New York v. Pacific Employers Insurance Co. As counsel for the City and the Board, I request that you assign this case an index number.

The City and the Board are exempt from paying a fee under section 8019(d) of the Civil Practice Law and Rules, which states as follows: "A clerk of a county within the City of New York shall not charge or receive any fee from the City of New York or the State of New York or from any agency or officer of either acting in official capacity."

Sincerely yours,

Sabita Krishnan

**Assistant Corporation Counsel** 

KINGS COUNTY CLERK

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# **VERIFICATION**

STATE OF NEW YORK )

: SS.:

COUNTY OF NEW YORK )

Sabita Krishnan, being duly sworn, says that she is an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York; that the City of New York and the Board of Education of the City School District of the City of New York are the plaintiffs in the within action; that the allegations in the Complaint as to plaintiffs are true to her knowledge; that the matters alleged therein upon information and belief, she believes to be true; and that the basis of her knowledge is the books and records of the plaintiffs and/or statements made to her by officers or employees thereof. This verification is not made by the plaintiff because the plaintiffs are a municipal corporation and a governmental board.

SABITA KRISHNAN

Sworn to before me this day of horary 2010

NOTARY PUBLIC

RICHARD J. COSTA
Notary Public, State of New York
No. 02C06032573
Qualified in Kings County
Commission Expires Nov. 1, 201

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### INSURANCE DEPARTMENT STATE OF NEW YORK One Commerce Plaza Albany, NY 12257

STATE OF NEW YORK

Supreme Court, County of KINGS

4955/10

The City of New York & The Board of Education of City School District of City of New York

Plaintiff(s)

against

Defendant(s)

Pacific Employers Insurance Company

RE: Pacific Employers Insurance Company

Attorney for Plaintiff(s) and Defendant(s) please take notice as follows:

Attorney for Plaintiff(s) is hereby advised of acknowledgement of service upon this Department Summons and Verified Complaint in the above entitled action on March 02, 2010 at New York, New York. The \$ 40.00 fee is also acknowledged.

Original to Attorney for Plaintiff (s):

Michael A. Cardozo Corporation Counsel of the City of New York 100 Church Street, 20th Floor New York, New York 10007

Persuant to the requirement of section 1212 of the Insurance Law, Defendant (s) is hereby notified of service as effected above. A copy of the paper is enclosed.

#### Duplicate to Defendant:

Saverio M Rocca, Esq Pacific Employers Insurance Company 436 Walnut Street WA04K Philadelphia, Pennsylvania 19106

clarky Welliams

Clark J. Williams Special Deputy Superintendent

Dated Albany, New York, March 03, 2010 467215

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INSTRUCTIONS: Check supercorists boxes and fill in blanks. Delete inappropriate indicited language and military service allegation if not applicable.

Swern to before me this 2 day of the 120/ 3

# Index No. 4955/2010

SUPREME COURT OF THE STATE OF NEW YORK KINGS COUNTY

THE CITY OF NEW YORK and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF CITY OF NEW YORK,

Plaintiffs.

- against -

PACIFIC EMPLOYERS INSURANCE CO.,

Defendant.

### AFFIDAVIT OF SERVICE

### MICHAEL A. CARDOZO

Corporation Counsel of the City of New York Attorney for Plaintiff City of New York

> 100 Church Street New York, New York 10007 Of Counsel: Sabita Krishnan Tel: (212) 442-0588

Due and timely service is hereby admitted.

Attorney for ______

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# SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

THE CITY OF NEW YORK and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF CITY OF NEW YORK,

Index No. 4955/10

Plaintiffs,

NOTICE OF FILING NOTICE OF REMOVAL

VS.

PACIFIC EMPLOYERS INSURANCE CO.,

Defendant.

TO: Sabita Krishnan, Assistant Corporation Counsel MICHAEL A. CARDOZO
Corporation Counsel of the City of New York 100 Church Street, Room 20-91
New York, New York 10007
Attorneys for Plaintiffs
The City of New York and The Board of Education of the City School District of City of New York

PLEASE TAKE NOTICE that Defendant Pacific Employers Insurance Company ("Defendant") in the above-captioned action has this day filed a Notice of Removal, a copy of which is attached hereto as <a href="Exhibit 1">Exhibit 1</a>, in the Office of the Clerk of the United States District Court for the Eastern District of New York. You are also advised that Defendant, upon filing of said Notice of Removal, filed a copy of the Notice with the Clerk of the Supreme Court of the State of New York, County of Kings, which has effected this removal in accordance with 28 U.S.C. § 1446(d).

• Case 1:10-cv-01518-ARR-MDG Document 1 Filed 04/06/10 Page 19 of 19 PageID #: 19

Dated: New York, New York April 6, 2010

GIBBONS P.C.

One Pennsylvania Plaza, 37th Floor New York, New York 10119-3701 (212) 613-2000 Attorneys for Defendant Pacific Employers Insurance Company

y: / ______

Paul A. Saso